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In The
Supreme Court of the United States

PAUL HENDLEY and the
CITY OF WAUKEGAN,

Petitioners,

v.

S. ALEJANDRO DOMINGUEZ,

Respondent.

On Joint Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a plaintiff's general verdict may be properly affirmed on appeal when the reviewing court has, contrary to the *Baldwin* principle, found that some, though not all, of the theories of recovery submitted to the jury are supported by the law and the evidentiary record?

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioners state that they have no parent companies or subsidiaries.

PARTIES TO THE PROCEEDINGS

The parties named in the caption are the parties to this proceeding.

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OPINIONS BELOW

The September 30, 2008 opinion of the United States Court of Appeals for the Seventh Circuit is reported at 545 F.3d 585 (7th Cir. 2008) (App. at 1-18). On May 30, 2008, the Seventh Circuit granted the parties leave to address certain cases that relate to the standard of review applicable to the general verdict issued below (App. at 26).

Judgment was entered in favor of plaintiff S. Alejandro Dominguez ("Dominguez") and against defendant Paul Hendley ("Hendley") on October 17, 2006 (App. at 19). Hendley's post-trial motions were denied on December 4, 2006 (App. at 20-21). A new judgment order was entered against Hendley and the City of Waukegan ("Waukegan") on December 13, 2006 (App. at 22-25). Hendley and Waukegan's joint petition for panel rehearing was denied on October 31, 2008 (App. at 27).

JURISDICTION

The Seventh Circuit's opinion was rendered on September 30, 2008. As stated above, Petitioners' petition for panel rehearing was denied on October 31, 2008. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT

A. Overview

On October 17, 2006, a jury returned a $9,063,000 general verdict in favor of Dominguez and against retired police officer Hendley. After the district court denied Hendley's post-trial motions, a judgment in that amount was entered against Hendley and his former employer, the City of Waukegan.

On appeal, Hendley and Waukegan ("Petitioners") sought to show the United States Court of Appeals for the Seventh Circuit that one of the eleven theories of recovery Dominguez presented to the jury was legally invalid and that one or more of the other ten theories lacked evidentiary support. Petitioners explained that, under the "*Baldwin* principle," named after *Maryland v. Baldwin*, 112 U.S. 490 (1884) and its progeny, a general verdict (whether it be in favor of the plaintiff or the defense) must be reversed whenever an appellant demonstrates that a liability or defense theory that lacks evidentiary or legal support was improperly submitted to a jury. Even though the *Baldwin* principle has been applied by the United States Supreme Court for over 100 years, the Seventh Circuit refused to apply it in this case and, instead, affirmed the district court's judgment because it believed that at least three of Dominguez's eleven liability theories were properly submitted to the jury.

This Court should review the Seventh Circuit's opinion in this case and clarify the standard by which general verdicts issued in civil cases should be reviewed. The Seventh Circuit and many of the other federal circuits have issued opinions that apply tests, including the "harmless error" test, that conflict with the *Baldwin* line of authority. Some Seventh Circuit cases have even gone so far as to require appellants to disprove every theory submitted by the successful litigant in order to obtain reversal of a general verdict. Conflicts regarding the appropriate standard of review for general verdicts exist amongst, between and even inside the circuits. Supreme Court review of this important, recurring issue will assist the federal circuit courts, who are regularly asked to review general verdicts in civil cases, as well as civil litigants, federal trial courts and state courts that look to Supreme Court precedent for guidance.

B. The Events Leading To Dominguez's Section 1983 Lawsuit

On September 19, 1989, Lisa Kraus ("Kraus") checked into the Naval Hospital in Great Lakes, Illinois and reported that three males had broken into her apartment earlier that day and that one of the males raped her. After hospital personnel examined Kraus and prepared a standard sexual assault kit, the investigation of the alleged rape was turned over to the Waukegan, Illinois Police Department (the "WPD").

On September 21, 1989, while Hendley and his partner John Moran ("Moran") were at the apartment complex where both Kraus and the rape suspect were reported to live, a security guard for the complex told Hendley that he had information indicating that Dominguez had raped Kraus. Later that day, while Hendley was talking to Dominguez inside the security guard's office, Kraus and Moran entered the apartment building and Kraus identified Dominguez as the person who had raped her two days earlier. Dominguez was arrested and indicted on two counts of aggravated sexual assault and one count of home invasion. On February 28, 1990, after a three-day bench trial, Dominguez was convicted. His conviction was affirmed on appeal and he was imprisoned for approximately four years.

After his release, a new test showed that Dominguez's DNA did not match the semen found on Kraus' underwear. His conviction was vacated on April 26, 2002 and, on April 23, 2004, he filed suit against Waukegan and a number of WPD officers, including Hendley, under 42 U.S.C. § 1983.

C. The Section 1983 Trial

Because all of the other officers named in Dominguez's § 1983 lawsuit died before trial, Hendley and Waukegan were the only defendants during the ten-day trial that took place between October 3 and 17, 2006. Before the jury was instructed, the trial judge ruled that Dominguez had failed to prove any

direct liability against Waukegan, leaving Hendley as the sole defendant.

The jury was instructed to find in favor of Dominguez if plaintiff had shown that Hendley caused his criminal trial to be unfair by (1) using an unnecessarily suggestive identification procedure to identify Dominguez as Kraus' attacker or (2) withholding material evidence pointing to Dominguez's innocence or (3) fabricating evidence against Dominguez. During the trial, Dominguez asserted nine distinct factual theories that, according to him, would support a finding that Hendley violated *Brady v. Maryland*, 373 U.S. 83 (1963) by withholding material, exculpatory evidence.

The jury returned a general verdict in favor of Dominguez in the amount of $9,063,000. Hendley's post-trial motions were denied on December 4, 2006 and an amended judgment order was entered against Hendley and Waukegan on December 13, 2006. Hendley and Waukegan appealed to the Seventh Circuit.

D. The Seventh Circuit Appeal

During the briefing before the Seventh Circuit, which included supplemental briefs from Dominguez and Petitioners regarding the standard of review for the jury's general verdict, Petitioners argued that (1) Dominguez had failed to produce any proof to support his claim that Hendley fabricated evidence; (2) Dominguez had failed to produce evidence to support

his argument to the jury that Hendley withheld nine distinct categories of evidence; and (3) Dominguez's theory that Hendley could be liable under § 1983 for conducting a "show up" identification procedure, even if there was no proof of post-arrest misconduct, should have been dismissed on statute of limitations and qualified immunity grounds. Petitioners also argued that, under the *Baldwin* principle, if Petitioners demonstrated that Dominguez's "show up" theory was deficient as a matter of law or that Dominguez's other ten liability theories were deficient due to a lack of evidentiary support, the district court's judgment should be reversed.

Although Dominguez argued in its response brief and supplemental memorandum that all of the theories it submitted to the jury were legally and factually supported, he also argued for a standard of review that is the exact reverse of the *Baldwin* principle. Dominguez argued that "when a jury returns a general verdict, this Court must affirm if the verdict finds support in any of the theories presented at trial." While Dominguez cited Seventh Circuit cases to support his position and attempted to distinguish the circuit-level cases cited by Petitioners, Dominguez failed to cite *Baldwin* or any of the other United States Supreme Court cases that have followed *Baldwin*.

The Seventh Circuit issued its opinion on September 30, 2008 affirming the judgment of the district court. *Dominguez v. Hendley*, 545 F.3d 585 (7th Cir. 2008). On October 14, 2008, Petitioners filed a

petition for rehearing arguing that the Seventh Circuit had failed to cite or apply the *Baldwin* principle. Petitioners asserted that the Seventh Circuit's opinion improperly adopted the approach advocated by Dominguez and affirmed the trial court's judgment based on its finding that three of the eleven theories presented to the jury were legally and factually supported.

In their petition for rehearing, Petitioners argued that Dominguez had not, at any time during the appeal, pointed to a single piece of trial evidence to support his claim that Hendley fabricated evidence against him. Petitioners argued that rehearing was justified because the Seventh Circuit never addressed Dominguez's failure to support his fabrication theory. As Petitioners argued, the Seventh Circuit erroneously assumed that the general verdict could stand as long as the record provided support for some of Dominguez's trial theories.

Petitioners argued that the Seventh Circuit improperly affirmed the jury's general verdict based on its finding that two out of Dominguez's nine theories related to Hendley's alleged withholding of evidence were supported by the record. The Seventh Circuit stated that, because the record supported Dominguez's assertion regarding "Hendley's failure to disclose the showup and the Navy Report," and because Hendley was required to show that "no reasonable jury could have found by a preponderance that he withheld material exculpatory evidence,"

(App. at 9) the jury's general verdict would be affirmed.

Citing *Wilmington Star Mining Co. v. Fulton*, 205 U.S. 60, 78 (1907), which reversed a plaintiff's general verdict because three of the plaintiff's eight negligence theories were not supported by trial evidence, Petitioners argued that the general verdict could not be affirmed unless the record contained at least some evidentiary support for the other seven "withholding evidence" theories. Petitioners asserted, for instance, that although Dominguez's attorney made lengthy arguments to the jury about Hendley's alleged removal of vaginal swabs from the rape kit, the crime lab reports and the transcript from Dominguez's criminal trial conclusively showed that these swabs were tested and used as exhibits at Dominguez's trial. Petitioners provided other examples of Dominguez's failure to produce evidence to support all nine of his *Brady* claims.

In addition, Petitioners argued that the Seventh Circuit had misconstrued their statute of limitations and qualified immunity arguments regarding Dominguez's claim that Hendley could be held liable for conducting an improper "show up" identification even in the absence of post-arrest misconduct. Petitioners argued that the jury's general verdict could not be affirmed because this particular claim was not supported by the law. Although Petitioners cited other Supreme Court and circuit-level cases applying the *Baldwin* principle, and argued that these cases were inconsistent with the Seventh Circuit's opinion, the

Seventh Circuit nevertheless denied Petitioners' petition for panel rehearing on October 31, 2008.

REASONS FOR GRANTING THE PETITION

I. The Seventh Circuit Decision In This Case Is In Direct Conflict With Well-Established Supreme Court Precedent Under *Baldwin*.

The Seventh Circuit's opinion in this case is in direct conflict with the *Baldwin* principle, which requires evidentiary and legal support for any theory upon which a jury could have rendered a general verdict. The Seventh Circuit's error hinges on its belief that a reasonable jury "could have found" for Dominguez on one of the theories for which the Seventh Circuit found evidentiary support. The Seventh Circuit violated the *Baldwin* principle by affirming the general verdict rendered below based upon its review of only three out of the eleven theories Dominguez submitted to the jury.

Because a general verdict cannot be broken down into constituent parts, and there are no means by which to determine what facts or legal theories the jury applied, cases following the *Baldwin* principle recognize that, first, a general verdict does not create a presumption that the jury accepted all of the prevailing party's claims and arguments and, second, a reviewing court should not project its own impressions of the evidence on a general verdict. Rather,

when a reviewing court determines that an improper or unsupported claim or defense has been submitted to a jury, the case should be reversed and remanded. The United States Supreme Court has consistently applied the *Baldwin* principle in civil cases over the last 100 years.

Maryland v. Baldwin, 112 U.S. 490 (1884) was a case brought on behalf of Markley, who claimed that he had been improperly excluded from his share of the estate distribution of his alleged father. The defendants raised five distinct defense theories, or pleas, including their first defense, which was that Markley was not one of the heirs of the deceased and was not entitled to a distributive share. *Id.* at 493. After the jury entered a general verdict in favor of the defense, the case was brought before the United States Supreme Court on a writ of error, where the Court reversed and remanded for a new trial. The Court held that, because the trial court had improperly admitted hearsay in support of the defendants' first plea, the "generality [of the jury's verdict] prevents us from perceiving upon which plea they found . . . [and] the verdict cannot be upheld, for it may be that by that evidence the jury were controlled under the instruction given." *Id.* The Court concluded that, because it was "impossible to say what effect it [the improper hearsay evidence] may have had on the minds of the jury on the question of the marriage," the case would have to be remanded for a new trial. *Id.* at 494.

In *Wilmington Star Mining Co. v. Fulton*, 205 U.S. 60, 78-79 (1907), the Supreme Court followed

Baldwin and reversed a general verdict, this time entered in favor of a plaintiff, because three of the eight negligence theories asserted against the defendant were not supported by evidence. In this case, a widow claimed that eight specified acts of negligence committed by a mining company proximately caused the death of her husband. The Supreme Court held that there was no evidence introduced at trial tending to establish the commission of acts of negligence charged in the second, third and sixth counts of the plaintiff's declaration. *Id.* at 77-78. Citing *Baldwin*, the Court stated that, unlike a criminal case, a general verdict in a civil case cannot be sustained when one or more of the counts of the declaration "have not been supported by evidence, and where it is impossible from the record to say upon which of the counts of the declaration the verdict was based." *Id.* at 79. Together, *Baldwin* and *Wilmington Star* make it clear that the *Baldwin* principle is designed to provide equal protection to civil plaintiffs and defendants against whom a general verdict has been entered.

Every United States Supreme Court case that has revisited the issue has applied the *Baldwin* principle. In *United N.Y. & N.J. Sandy Hook Pilots Ass'n v. Halecki,* 358 U.S. 613 (1959), this Court reversed a plaintiff's general verdict where the case had been submitted to the jury on a strict liability theory of unseaworthiness and an alternative theory of negligence. The Court held that the plaintiff, the administrator of an estate, could not recover under the unseaworthiness doctrine because the deceased

had not been performing the type of work that would implicate liability under the doctrine. *Id.* at 618. The Court concluded that "a new trial will be required, for there is no way to know that the invalid claim of unseaworthiness was not the sole basis for the verdict." *Id.* at 619.

The Court reached the same result in *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prod. Co.*, 370 U.S. 19 (1962), an anti-trust case where the defendant objected to the proposed jury instructions offered with respect to one of plaintiff's trial theories. The Supreme Court cited *Baldwin* and reversed, holding that "[s]ince we hold erroneous one theory of liability upon which the general verdict may have rested . . . it is unnecessary for us to explore the legality of the other theories." *Id.* at 29-30.

The Supreme Court also applied the *Baldwin* principle in *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 384 (1991), reversing a plaintiff's general verdict because the verdict could have been premised upon alleged violations of federal anti-trust laws for which the defendants had immunity. Likewise, in *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993), a disjunctively worded elements instruction (like the instruction presented in this case) was presented to the jury, stating that the defendants could be held liable under any one of three theories (monopolizing, attempting to monopolize or conspiring to monopolize). After the Supreme Court held that the jury had been improperly instructed with respect to the elements of proof for

"attempted monopolization," the Court cited *Sunkist*, reversed the general verdict and remanded, stating that "the jury's verdict did not negate the possibility that the § 2 verdict rested on the attempt to monopolize ground alone." *Id.* at 459.

The *Baldwin* line of Supreme Court authority therefore provides a bright line rule regarding the standard of review for general verdicts. If a jury enters a general verdict, and a reviewing court later determines that at least one of the liability or defense theories upon which the jury may have relied was either legally deficient or not supported by proper evidence, the general verdict must be reversed.

Rather than applying the *Baldwin* principle in this case and requiring evidentiary and legal support for each of the eleven theories Dominguez presented to the jury, the Seventh Circuit affirmed the district court's judgment and the jury's general verdict based upon its review of only three of these theories. Neither Dominguez nor the Seventh Circuit could point to a single piece of evidence supporting Dominguez's distinct claim that Hendley fabricated evidence that was used to convict Dominguez. The absence of evidence on this theory alone requires reversal of the jury's general verdict under *Baldwin*.

In addition, although the Seventh Circuit claimed to have found evidentiary support for two out of nine of Dominguez's theories regarding Hendley's alleged withholding of material, exculpatory evidence, neither the Seventh Circuit nor Dominguez identified

trial evidence to support the other seven theories. For instance, as the Petitioners argued in their petition for rehearing, even though Dominguez argued to the jury that Hendley caused Dominguez's conviction by stealing evidence from the rape kit, there is irrefutable evidence that the very items Dominguez claimed were missing from the rape kit were tested by the crime lab and presented as exhibits during his criminal trial.

The Seventh Circuit stated Hendley could only prevail on appeal if he showed that "no reasonable jury could have found by a preponderance of evidence that [Hendley] withheld material exculpatory evidence." (App. at 9). The Seventh Circuit affirmed based on its belief that the record supported Dominguez's claim that Hendley withheld information about the alleged "show up" identification and a Navy Report. But the Court's ruling stands *Baldwin* on its head. Although the jury "could have found" for Dominguez on these two theories, this does not relieve the court of appeals of its duty to review the other seven theories. Petitioners presented arguments which show that these other theories lacked evidentiary support.

The Supreme Court has been very clear that a reviewing court cannot affirm a general verdict based upon the mere possibility the jury relied upon a valid theory when it is also possible the jury relied upon an invalid theory. The Seventh Circuit affirmed the general verdict in this case because that verdict "could have" been based on a valid theory of recovery.

This ruling should be reversed and the matter should be remanded to the Seventh Circuit for further review consistent with *Baldwin*.

II. The Seventh Circuit Has Taken Three Conflicting Approaches In Its Review Of General Verdicts.

This case is not an isolated incident. Although the Seventh Circuit has, at times, applied the *Baldwin* principle properly, the case law demonstrates that the Seventh Circuit has taken at least three different approaches in its review of general verdicts. The Seventh Circuit has either: (1) applied *Baldwin*; (2) completely ignored *Baldwin*; or (3) created a "harmless error" exception to *Baldwin*. This case presents an opportunity for this Court to clarify the law and resolve the internally inconsistent approaches applied by the Seventh Circuit.

The Seventh Circuit has, at times, applied the *Baldwin* principle correctly. In *Lawndale Natl. Bank v. Am. Cas. Co.*, 489 F.2d 1384 (7th Cir. 1973), for instance, the Seventh Circuit cited *Baldwin* and *Sunkist* and reversed a general defense verdict. The court stated that because it "is impossible to say whether the verdict was based on the misrepresentation defense that should have been stricken or the arson defense that was properly submitted to the jury" it could not "without invading the province of the jury, decide that the evidence of arson justifies the verdict for American Casualty." *Id.* at 1388-89. *See*

also, Dawson v. New York Life Ins. Co., 135 F.3d 1158, 1165 (7th Cir. 1998) (applying *Baldwin* and holding that an incorrect instruction regarding one theory calls for a new trial even if the jury could have based its verdict on a different, properly instructed theory); *Saturday Evening Post Co. v. Rumbleseat Press, Inc.*, 816 F.2d 1191, 1197 (7th Cir. 1987) (when a jury is given a mixture of proper and improper instructions, its verdict must be set aside, even if it may have been based on a theory on which the jury was properly instructed).

In other instances like this case, the Seventh Circuit has outright ignored *Baldwin*, applying standards of review that are in direct conflict. For instance, in *McGrath v. Zenith Radio Corp.*, 651 F.2d 458 (7th Cir. 1981), the plaintiff brought claims for breach of contract, fraud and violations of the securities laws against his former employer in conjunction with his termination and the jury issued a general verdict. *Id.* at 461. The Seventh Circuit stated that "to triumph on appeal, defendants must show that under none of the three rationales was the plaintiff entitled to the award of compensatory and punitive damages." *Id.* at 464. The standard articulated in *McGrath* actually inverts the *Baldwin* principle by requiring an appellant to disprove every one of the appellee's trial theories in order to obtain reversal.

Likewise, in *Culli v. Marathon Petroleum Co.*, 862 F.2d 119 (7th Cir. 1988), the court held that because "plaintiffs could have succeeded under one of two alternative independent theories of relief, and the

jury returned a general verdict as opposed to a special verdict which, for example, could have included specific findings with respect to each theory of relief, we need only find that there was substantial evidence to support the jury's verdict under at least one of the two alternative theories." *Id.* at 123. In *Kossman v. N.E. Illinois Regl. Commuter R.R. Corp.*, 211 F.3d 1031 (7th Cir. 2000), the Seventh Circuit again ignored *Baldwin* and upheld a general verdict, ruling that even if some of the issues presented to the jury were insufficient, the defendant failed to request a special verdict or a general verdict with answers to written interrogatories. *Id.* at 1037. The court further held that "when a jury only returns a general verdict, we need only find support in the record for one of the theories presented to the jury in order to affirm the jury award." *Id.*

The Seventh Circuit has also applied a "harmless error" exception to *Baldwin*. For example, in *Collum v. Butler*, 421 F.2d 1257 (7th Cir. 1970), the plaintiff brought a Section 1983 action to recover damages for police brutality. The trial judge instructed the jury that the plaintiff could recover if the defendants unlawfully imposed corporal punishment, prevented the plaintiff from obtaining legal advice, or prevented the plaintiff from contacting his family or friends. *Id.* at 1260. The jury rendered a general verdict for the plaintiff. *Id.* at 1258. On appeal, the Seventh Circuit held the trial court erred by instructing the jury on plaintiff's last two claims. *Id.* at 1260. Despite the erroneous instruction, the Seventh Circuit affirmed,

stating that the two improper claims were insignificant to the trial. *Id.* The Seventh Circuit concluded that: "[t]o permit other issues which occupied positions of such relative insignificance in the trial to be treated now as so important as to make their submission to the jury prejudicial would not serve the interests of justice. Error must be viewed with respect to its relative effect on the results of trial." *Id.*

Again, in *Simmons v. Pinkerton's Inc.*, 762 F.2d 591 (7th Cir. 1985) the Seventh Circuit applied a harmless error exception. The court stated that, "in this case we are simply not persuaded by defendants' arguments that the erroneous instruction could have led to such profound confusion that the jury really might have based its decision on some theoretical, inapplicable breach of the Indiana Detective Law. We think we are entitled to have somewhat higher expectations of the jury." *Id.* at 599 n.3.

Many of the Seventh Circuit cases that fail to cite *Baldwin* and are in conflict with Supreme Court lack precedential lineage. *Kossman*, for instance, relied upon *Wassell v. Adams*, 865 F.2d 849, 855 (7th Cir. 1989) and *Culli*. *Kossman*, 211 F.3d at 1037. But *Wassell* does not directly support the holding in *Kossman* or create a defense obligation to propose a special verdict form. *Culli*, on the other hand, cites *Cannon Oil & Gas Well Serv., Inc. v. Evertson*, 836 F.2d 1252, 1254-55 (10th Cir. 1987), a Tenth Circuit case that provides no support for *Culli*'s holding and has nothing to do with the standard an appellant must meet to overturn a plaintiff's general verdict.

Culli, 862 F.2d at 123. The *McGrath* court cited no authority for the quote cited above.

The Seventh Circuit's approach to general verdicts should be reviewed because, by and large, Seventh Circuit law in this area is more internally inconsistent than the law in any other circuit. In addition, cases like *McGrath*, *Culli* and *Kossman* actually invert the *Baldwin* principle by requiring appellants to disprove every trial theory presented by the appellee in order to obtain reversal.

III. Other Circuits Review General Verdicts Under Tests That Directly Conflict With The *Baldwin* Principle.

Similar to the Seventh Circuit, the other circuit courts often ignore *Baldwin* and apply different standards for the review of general verdicts. For example, the Ninth Circuit has created a four-part test for the review of general verdicts that is in direct conflict with *Baldwin*. The First Circuit recently acknowledged that the Supreme Court has made "unequivocal pronouncements" regarding the application of the *Baldwin* principle in civil cases. Nevertheless, the First Circuit has, at other times, applied a "harmless error" exception to *Baldwin*. Similarly, the Fifth Circuit applies *Baldwin* correctly some of the time, but has also developed a "reasonably certain" standard to evaluate whether errors that underlie a general verdict are "harmless." There is conflict amongst the circuits and, just like the Seventh Circuit,

the precedent of many of the circuits is also internally inconsistent.

The First Circuit opinion in *Kerkhof v. MCI Worldcom, Inc.*, 282 F.3d 44 (1st Cir. 2002) highlights the division in authority that has developed amongst the circuits. Although the *Kerkhof* court recognized that "the general rule, adopted by this circuit, is that a new trial is usually warranted if evidence is insufficient with respect to any one of multiple claims covered by a general verdict," *Kerkhof,* 282 F.3d at 52, the court also stated that:

> Despite seemingly unequivocal pronouncements by the Supreme Court, the law in the circuits on this point is disparate. *Compare McGrath v. Zenith Radio Corp.*, 651 F.2d 458, 464 (7th Cir. 1981) (adopting the criminal rule in civil cases), with *Traver v. Meshriy*, 627 F.2d 934, 938-39 (9th Cir. 1980) (adopting a discretionary standard with multiple factors), and *McCord v. Maguire*, 873 F.2d 1271, 1273-74 (9th Cir.) (limiting *Traver* to situations where multiple claims are submitted for general verdict rather than those where a single claim is submitted based on multiple factual theories). Even in this circuit, although not on our facts, harmless error might resolve the issue. *See Brochu v. Ortho Pharm. Corp.*, 642 F.2d 652, 662 (1st Cir. 1981).

As indicated in *Kerkhof,* the First Circuit has applied *Baldwin* correctly in cases like *New York & Porto Rico S.S. Co. v. Garcia*, 16 F.2d 734, 737 (1st Cir. 1934),

but has also issued decisions like *Brochu v. Ortho Pharm. Corp.*, 642 F.2d 652, 662 (1st Cir. 1981) (applying the narrow "subset theory" of harmless error) and *Davis v. Rennie*, 264 F.3d 86, 105-10 (1st Cir. 2001) (applying the broader "reasonably certain" approach), which apply two distinct harmless error standards.

In another recent case, the First Circuit held that "[a]lthough not all circuits follow our practice, it does accord with the Supreme Court precedents that require remand in civil cases when one of several claims or theories encompassed in a general verdict was flawed (*e.g.*, because of a mistaken jury instruction)." *Gillespie v. Sears, Roebuck & Company*, 386 F.3d 21, 30 (1st Cir. 2004). In a footnote, the *Gillespie* court referred once again to the inter-circuit conflict regarding the standard of review for general verdicts as follows:

> *See, e.g., E. Trading Co. v. Refco, Inc.*, 229 F.3d 617, 621-22 (7th Cir. 2000) (requiring an affirmative showing that the jury "probably was confused" by being instructed on a claim or defense for which the party had presented no evidence). *Compare Traver v. Meshriy*, 627 F.2d 934, 938-39 (9th Cir. 1980) (adopting a four-factor discretionary standard) *with McCord v. Maguire*, 873 F.2d 1271, 1273-74 (9th Cir. 1989) (limiting *Traver* to general verdicts encompassing multiple legal theories and applying a new-trial rule for general verdicts based on a single legal theory encompassing multiple factual theories), *amended by* 885 F.2d 650 (9th Cir. 1989).

The Ninth Circuit has not only deviated from *Baldwin*, it has created its own unique test for reviewing general verdicts. In *Traver v. Meshriy*, 627 F.2d 934 (9th Cir. 1980), without even acknowledging Supreme Court cases applying the *Baldwin* principle, the Ninth Circuit announced the following four factor test for the review of general verdicts: (1) the potential for jury confusion that may have resulted from an erroneous submission of a particular claim; (2) whether privileges or defenses of the losing party apply to the count upon which the verdict is being sustained so that they would have been considered by the jury with reference to the count; (3) the strength of the evidence supporting the count being relied upon to sustain the verdict; and (4) the extent to which the same disputed issues of fact apply to one or more of the theories in question. *Id.* at 938-39.

Although subsequent Ninth Circuit panels have applied *Traver*, the case has also been criticized. In *Kern v. Levolor Lorentzen, Inc.*, 899 F.2d 772, 782 (9th Cir. 1990), Justice Kozinski argued in his dissenting opinion that the *Traver* approach "override[s] sub silentio a procedural rule four times stated by the United States Supreme Court in unequivocal terms . . . " Justice Kozinski criticized the Ninth Circuit's discretionary rule, observing that the "Court could not possibly have known if the verdict was based on due process [on which it affirmed the judgment], equal protection [the possibly erroneous theory], or both . . . [I]t simply relied on Traver without doing the analysis." *Id.* at 791.

The Fifth Circuit applied the *Baldwin* principle in *Nowell v. Universal Elec. Co.*, 792 F.2d 1310, 1312 (5th Cir. 1986), but it has also applied a "reasonably certain" standard in evaluating harmless error. In *Braun v. Flynt*, 731 F.2d 1205 (5th Cir. 1984), for instance, the Fifth Circuit upheld a general verdict despite an instruction authorizing recovery on either a false light theory (that was supported by evidence) or an appropriation theory (that was not). *Id.* at 1206. The court ruled that, because the entire focus of the plaintiff's case was her claim that the publication of an indecent photograph of her in Chic magazine placed her in a false light and damaged her reputation, the court was "totally satisfied, or, . . . 'reasonably certain'" that the jury had not based its verdict on the invalid claim. *Id. See also, Muth v. Ford Motor Co.*, 461 F.3d 557, 565 (5th Cir. 2006) (finding harmless error in jury instructions under the reasonably certain standard).

Although the Eighth Circuit applied *Baldwin* faithfully in *Dudley v. Dittmer*, 795 F.2d 669, 673-74 (8th Cir. 1986) and *Dakota Industries, Inc. v. Ever Best Ltd.*, 28 F.3d 910, 912 (8th Cir. 1994), that court has also recognized that, under a certain set of facts, it might apply a harmless error exception. For instance, in *Mueller v. Hubbard Milling Co.*, 573 F.2d 1029, 1039-40 (8th Cir. 1978), the Eighth Circuit analyzed the facts in that case under the harmless error exception, but stated that the facts did not justify application of the exception. Likewise, in *E.I. Du Pont De Nemours & Co. v. Berkley & Co.*, 620

F.2d 1247, 1258 n.8 (8th Cir. 1980), the Eighth Circuit stated that "[a] new trial will not result where it is reasonably certain that the jury was not significantly influenced by issues erroneously submitted to it" but also stated that "no such reasonable certainty is possible here."

The Third Circuit, which consistently applied *Baldwin* until 1999, *see, e.g., Albergo v. Reading Co.*, 372 F.2d 83, 85-86 (3d Cir. 1966), held in *Hurley v. Atlantic City Police Dept.*, 174 F.3d 95, 121-22 (3d Cir. 1999) that the harmless error exception applied where a jury returned a general verdict that encompassed an improper *quid pro quo* theory of sexual harassment. Likewise, while the Second Circuit applied the *Baldwin* principle in *Katara v. D.E. Jones Commodities, Inc.*, 835 F.2d 966, 971 (2d Cir. 1987), in *Bruneau v. S. Kortright Central School Dist.*, 163 F.3d 749, 759-60 (2d Cir. 1998), the court stated that the harmless error exception to *Baldwin* may be applied when the court is "sufficiently confident" that the verdict was not influenced by an error in the jury charge. *See also Morrisey v. National Maritime Union of Am.*, 544 F.2d 19, 27 (2d Cir. 1976) (recognizing harmless error exception to *Baldwin*).

The Tenth Circuit has also not applied *Baldwin* consistently. In *Asbill v. Housing Authority of Choctaw Nation*, 726 F.2d 1499, 1504 (10th Cir. 1984), the Tenth Circuit held that *Baldwin* and its progeny should not be read to require reversal in every case. The court stated that "[w]e note this holding [*Baldwin*] does not paint with as broad a brush as

appears from the language quoted. As with all errors committed at trial, a litmus test for reversal is whether the appellant was thereby unjustly prejudiced." *Id.*

It is therefore evident that the United States Courts of Appeals have inconsistently applied different standards of review for general verdicts in situations where one or more of the theories submitted to the jury at trial was presented in error. Some circuits have embraced *Baldwin*, some have ignored *Baldwin* altogether, and some have created their own exceptions not contemplated by the Supreme Court.

IV. Supreme Court Review Is Warranted Because This Is An Important, Recurring Issue And Because Others Have Called Upon This Court To Confirm The Continuing Application Of The *Baldwin* Principle.

Because the federal circuits are regularly asked to review general verdicts, and because it is not uncommon for a circuit court to find that one or more liability or defense theories submitted to a jury was presented in error, clarifying the standard of review for general verdicts warrants review by this Court. The conflict among the circuits and the need for Supreme Court intervention on this issue was highlighted by David M. Axelrad and Loren Kraus in *The Federal General Verdict Rule: Conflict in the Courts of Appeals*, 43 Fed. Law. 43, 43 (June 1996). *See also* Note, General Verdicts in Multi-Claim Litigation, 21 Mem. St. U. L. Rev. 705, 732 (1991). Additionally,

other petitions for certiorari have been filed by litigants seeking clarification regarding the continuing efficacy of the *Baldwin* principle. *See, e.g., Petition for a Writ of Certiorari, Transp. Ins. Brokers, Inc. v. D.W. Ferguson & Assoc.*, No. 94-2113, 1995 WL 17050048 (U.S. June 26, 1995), *cert. denied*, 516 U.S. 823; *Petition for a Writ of Certiorari, Ernst & Young LLP v. Knapp*, No. 96-886, 1996 WL 33421898 (U.S. Dec. 3, 1996), *cert. denied*, 519 U.S. 1112; *Petition for a Writ of Certiorari, The Atlantic City Police Dept. v. Hurley*, No. 99-431, 1999 WL 33633057 (U.S. Sept. 8, 1999), *cert. denied*, 528 U.S. 1074; *Petition for a Writ of Certiorari, Mitsubishi Elec. Corp. v. Ampex Corp.*, No. 99-1287, 2000 WL 34014313 (U.S. Jan. 31, 2000), *cert. denied*, 529 U.S. 1054.

CONCLUSION

For all of the foregoing reasons, this Petition For A Writ Of Certiorari should be granted.

Respectfully submitted,

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545 F.3d 585

United States Court of Appeals, Seventh Circuit.
S. Alejandro DOMINGUEZ, Plaintiff-Appellee,
v.
Paul HENDLEY and City of Waukegan,
Defendants-Appellants.
Nos. 07-1004, 07-1005, 07-3030.

Argued May 30, 2008.
Decided Sept. 30, 2008.
Rehearing Denied Oct. 31, 2008.

Jonathan I. Loevy (argued), Loevy & Loevy, Chicago, IL, for Plaintiff-Appellee.

Steven D. Pearson, Eric E. Newman (argued), Meckler, Bulger & Tilson, Chicago, IL, Daniel P. Field, Scariano, Himes & Petrarca, Waukegan, IL, for Defendants-Appellants.

Before BAUER, RIPPLE, and WOOD, Circuit Judges.

WOOD, Circuit Judge.

In September 1989, when Alejandro Dominguez was fifteen years old, he was arrested on charges of home invasion and sexual assault, based on the allegations of eighteen-year-old Lisa Kraus, who lived in the same building as he did. Dominguez was convicted and spent four years incarcerated before being paroled. Throughout this process and the period following his release, he maintained his innocence and worked to exonerate himself. With the help of a new lawyer, Dominguez eventually proved that

his DNA did not match the semen found on Kraus's underwear, and on April 26, 2002, his conviction was vacated. In August 2005, Dominguez received a pardon from the Governor.

On April 23, 2004, Dominguez filed a complaint under 42 U.S.C. § 1983 against the City of Waukegan and the police officers – in particular Officer Paul Hendley – involved in the investigation of the incident with Kraus. After the complaint was amended more than once to add parties and claims and drop parties who had died, the case went to trial with only Hendley and the City as defendants. After all evidence was submitted to the jury but before the jury rendered its verdict, the district court dismissed the City from the suit, based on a failure of proof, but with the express understanding that the City was bound to indemnify Hendley for any judgment incurred. After a ten-day trial, the jury found in favor of Dominguez and awarded him a judgment of $9,063,000, based on its finding that Hendley had violated Dominguez's right to due process by taking actions that denied him a fair trial. At that point, the City repudiated its prior position and stated that it might not indemnify Hendley, prompting Dominguez to move for post-judgment relief. Based on the City's judicial admissions on the issue of indemnification, the district court reinstated it as a defendant and amended the judgment to make Hendley and the City jointly and severally liable for the judgment in favor of Dominguez. Hendley and the City appeal, and we affirm.

I

Hendley's first argument on appeal is that Dominguez's claim is barred by the statute of limitations. We review a district court's ruling with respect to a limitations defense *de novo*. *United States v. Gibson*, 490 F.3d 604, 608 (7th Cir.2007).

In Illinois, the statute of limitations for § 1983 claims is two years. See 735 ILCS 5/13-202; *Williams v. Lampe*, 399 F.3d 867, 870 (7th Cir.2005). Dominguez filed his complaint on April 23, 2004, and so if his claim accrued on or after April 23, 2002, then his lawsuit was timely. His conviction was vacated on April 26, 2002, which falls within this window. The real question is whether that is the proper event on which to focus.

The jury was instructed to find for Dominguez if it found that the defendant caused Dominguez's criminal trial to be unfair. A § 1983 claim for a due process violation based on the denial of a fair criminal trial may be brought only after the conviction is set aside. Otherwise, that civil claim would imply the invalidity of the outstanding conviction and would thus constitute a collateral attack on the conviction through an impermissible route. *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). So viewed, Dominguez's claim did not accrue until 2002 and is therefore timely.

Hendley argues, however, that the underlying reason why Dominguez asserts that his trial was unfair relates to his arrest, and thus we should find

that his claim accrued no later than the time when his unlawful seizure was terminated – that is, the time of his arraignment. Fourth Amendment claims for false arrest or unlawful searches accrue at the time of (or termination of) the violation. *Wallace v. Kato,* 549 U.S. 384, 127 S.Ct. 1091, 166 L.Ed.2d 973 (2007). Even if no conviction could have been obtained in the absence of the violation, the Supreme Court has held that, unlike fair trial claims, Fourth Amendment claims as a group do not necessarily imply the invalidity of a criminal conviction, and so such claims are not suspended under the *Heck* bar to suit.

Hendley, however, is assuming that Dominguez's claim is limited to his arrest and does not also include independent charges of due process violations. That assumption overlooks critical parts of the case. Dominguez has asserted all along that the defendant officers violated his right to due process by manipulating or tampering with identification and testimonial evidence. He backed up these allegations with evidence at the trial. His due process claim is thus more than a Fourth Amendment claim by another name, and for that reason, it is not barred by the limitations rule announced in *Wallace*. Dominguez's right to sue arose only after his criminal conviction was set aside, and, as the district court held, he filed within the two years permitted by law.

II

Hendley next argues that he was entitled to qualified immunity because he did not proximately cause any constitutional violations at Dominguez's criminal trial. It is somewhat unusual to encounter a qualified immunity defense this late in the proceedings, because qualified immunity is normally raised during the pretrial phase so that the public official can avoid the burdens of trial. It is technically possible, however, to raise the defense after a jury verdict, if the immunity question itself depended on disputed issues of material fact. See *Johnson v. Jones,* 515 U.S. 304, 313, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995).

In this case, the defendants raised the defense of qualified immunity in their answer, but they did not move for summary judgment. This was a reasonable way to proceed, because Hendley denied that he had engaged in the misconduct of which Dominguez accused him: withholding material exculpatory evidence from the defense and prosecutor, orchestrating a show-up identification procedure that caused the criminal trial to be unfair, and fabricating evidence against Dominguez. There was and is no disputing that such conduct violates clearly established constitutional rights. Hendley merely hoped that the jury would credit his version of what happened rather than Dominguez's.

Hendley's biggest problem is that qualified immunity is a doctrine designed to respond to legal uncertainty, but causation (a factual matter) has

nothing to do with *legal* uncertainty. His contention about a lack of "proximate cause" is really just an assertion that the evidence was insufficient to support the jury's finding that his conduct proximately caused Dominguez's damages. Citing cases discussing proximate cause and superseding cause in § 1983 claims, Hendley asserts that "numerous circuits have held that police officers who provide truthful information to subsequent decisionmakers in the criminal justice system cannot be held liable under § 1983 for allegedly wrongful convictions." Quoting from *Townes v. City of New York,* 176 F.3d 138, 147 (2d Cir.1999), he argues that the supervening cause doctrine applies "in 'the absence of evidence that the police officer misled or pressured the official who could be expected to exercise independent judgment.'" These cases are of no help to Hendley, however, for they merely highlight the differences between those cases and Dominguez's.

Dominguez submitted sufficient evidence at trial to allow the jury to find that Hendley *did not* provide truthful information to subsequent decisionmakers, and that he *did* mislead the official who could be expected to exercise independent judgment. For example, the criminal prosecutor testified that he was never told about any showup used in Kraus's identification of Dominguez. Dominguez also proved that Hendley received an exculpatory document, known to the parties as the "Navy Report," but that this report was missing from the official file that had been provided to the prosecutor during the criminal trial, and

was not part of the materials furnished to Dominguez in discovery. The Navy Report would have provided valuable exculpatory evidence for Dominguez. After Kraus was allegedly sexually assaulted, she visited a Navy hospital and was interviewed about the incident. The account that she gave to the naval officer differed in significant ways from accounts she later gave in the investigation of the incident. Hendley denied that he arranged a showup, and denied that he had ever seen the exculpatory Navy Report. The jury therefore had to decide who was telling the truth on these points, and ultimately whether Hendley misled the prosecution and caused Dominguez to receive an unfair criminal trial. This determination had nothing to do with qualified immunity.

Hendley also argues that Dominguez has not proved that Hendley arrested him without probable cause. This would be relevant only if the verdict were based on a false arrest claim, but it was not. Even supposing Hendley did have probable cause at the time of arrest, the question is whether Hendley took actions (whether before or after the arrest) that caused Dominguez to receive an unfair trial. Probable cause at the time of arrest would not sanitize such acts.

III

The jury was instructed that, in order to find for Dominguez, it had to find that Hendley caused Dominguez's criminal trial to be unfair through any

of three specified courses of conduct: (1) withholding material, exculpatory evidence in violation of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); (2) causing an unreliable identification procedure to be used at his trial; or (3) fabricating evidence. Hendley argues that the first of these – the *Brady* basis – should not have been submitted to the jury. He contends that Dominguez failed adequately to plead and support that theory, and also that he failed to prove it at trial. Neither point has merit.

Fundamentally, the first point overstates the importance of pleadings by the time a case reaches trial. The purpose of a complaint is to put the defendant on notice of the claim that is being asserted against him, her, or it; by the time of trial, the case has normally proceeded through discovery and the parties have provided whatever notice of their trial issues and evidence the district court ordered. This record suggests no lack of notice to Hendley or the City. They did not object to Dominguez's evidence at trial about the *Brady* violations – indeed, that evidence was a prominent part of the trial. The defense submitted evidence that materials were not withheld from the criminal prosecutor. As Dominguez points out, even if something is missing entirely from the pleadings, it can be tried by consent. See FED.R.CIV.P. 15(b) ("When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move – at any time, even after judgment – to amend the pleadings to

conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue."). The record easily shows that supposed flaws in the way that Dominguez described his *Brady* point in the pleadings had no effect on the trial.

Hendley's assertion that the evidence was insufficient to support Dominguez's *Brady* theory is also unpersuasive. Once again, Hendley must show that no matter how the evidence is weighed or credited, no reasonable jury could have found by a preponderance that he withheld material exculpatory evidence from Dominguez when Dominguez was being criminally prosecuted. The trial record simply does not support such a conclusion, given Hendley's failure to disclose the showup and the Navy Report.

IV

Hendley next attacks the court's instructions to the jury. He has three complaints. First, he argues that the court erred in not giving his proposed instruction reminding the jury that Hendley may be held accountable only for conduct in which he was personally involved, not for what others did or did not do. He accuses Dominguez of trying to blur the lines by laying all responsibility at Hendley's feet, referring to "they," and characterizing the investigation as Hendley's. The district court declined to give the proposed instruction because the instruction it had already given referred only to results caused by

Hendley. The plaintiff was entitled to try to prove Hendley's responsibility for various acts, and Hendley had the opportunity to disclaim control, involvement, or responsibility and convince the jury not to find him liable.

Hendley thinks, however, that the jury remained confused on this point, and as proof he points to the question it submitted to the judge during deliberation: "If we get to the point of considering damages, do we consider the total amount of damages or do we conclude the amount of damages in light of the degree of possible wrongdoing of the defendant." At that point, Hendley renewed his request for an instruction on personal involvement, but the court decided to give the jury a proximate cause instruction.

The jury's question does not necessarily show that they were considering assigning liability to Hendley for the acts of others. It might have suggested that they were thinking of discounting his liability to take into account the actions of others. Under ordinary principles of tort law, the fact that tortfeasor A's negligent act proximately caused $100 in damages means that A is liable for the entire sum of $100, even if co-tortfeasor B could also have been liable for that same amount (with no double collection by the victim, of course). Not only does this explanation undermine Hendley's claim that his instruction was necessary to clear up confusion, it also supports the district court's decision to respond to the question by giving a proximate cause instruction.

Second, Hendley claims that the court erred by failing to instruct the jury that Hendley had no post-arrest duty to investigate. This argument is premised on Hendley's effort to characterize Dominguez's claim as exclusively based on false arrest. Because it is not, and because Dominguez presented evidence from which a jury could conclude that Hendley engaged in post-arrest conduct (like manipulation of evidence) that deprived Dominguez of a fair trial, Hendley's proposed instruction on "no post-arrest duty to investigate" was inappropriate and the district court properly rejected it.

Finally, Hendley claims that the elements instruction was erroneous because it failed to discuss superseding cause, improperly submitted the *Brady* theory, and failed to limit recovery to the period of incarceration between arrest and arraignment as contemplated by this court's decision in *Wallace v. City of Chicago,* 440 F.3d 421 (7th Cir.2006), *aff'd on other grounds sub nom. Wallace v. Kato,* 549 U.S. 384, 127 S.Ct. 1091 (2007). But the court gave a proximate cause instruction, and so Hendley was not prejudiced by the absence of an instruction discussing superseding cause. We have already explained why there was no error in the court's treatment of the *Brady* issue. Finally, with respect to the proper recovery period, the district court correctly concluded that the limitation Hendley proposed was not appropriate, since Dominguez's claim was for deprivation of a fair trial rather than false arrest. The district court did hold that damages for any unlawful seizure of Dominguez

had to be directly related to his thirteen days of detention preceding indictment, but that was prior to this court's issuance of *Wallace v. City of Chicago,* when the circuits were split on the time of accrual of Fourth Amendment claims, and certainly prior to the Supreme Court's affirmance in *Wallace v. Kato.* Thus, at the time, Dominguez's Fourth Amendment claim was still a potential theory of recovery. The district court specifically noted that its ruling "would not serve as a limitation on the admissibility of evidence as to the state law claims included in Dominguez's Complaint that are to be resolved in the same trial as his Section 1983 Fourth Amendment claim." Hendley points out that the court "failed to recognize that the only state law claims were asserted against Kraus and McCandless, both of whom had already been dismissed." The district court might inadvertently have referred to state law claims while meaning to allude to claims other than the Fourth Amendment claim, namely, the federal due process claim. In any event, the Fourth Amendment claim was eventually dismissed as time-barred and only the due process claim remained. After that, Hendley's proposed recovery-period limitation was no longer an appropriate instruction.

V

Hendley's final argument is that the cumulative effect of a number of trial errors deprived *him* of a fair trial, and thus the district court abused its discretion when it denied his motion for a new trial. We

will examine each alleged error individually; if we find two or more errors, we will assess the cumulative effect to determine whether the district court abused its discretion in not granting a new trial. See *United States v. Allen,* 269 F.3d 842, 847 (7th Cir.2001).

Each error alleged by Hendley is itself subject to the abuse of discretion standard. See *Thompson v. City of Chicago,* 472 F.3d 444, 453 (7th Cir.2006) (evidentiary rulings); *Gorlikowski v. Tolbert,* 52 F.3d 1439, 1444 (7th Cir.1995) (enforcement of a pretrial order); *United States v. Miller,* 276 F.3d 370, 373 (7th Cir.2002) (improper remarks by counsel); *United States v. Vasquez-Ruiz,* 502 F.3d 700, 704 (7th Cir.2007) (potential juror bias). Once again, he faces an uphill battle because of the standard of review.

Hendley first raises a number of complaints about things that Dominguez's lawyer did during the trial. For example, he argues that the lawyer, in his opening and closing remarks and witness examinations, misstated facts and misled the jury. First, he objects to the fact that counsel called Hendley a "bad officer." We do not believe that the district court abused its discretion in letting the remark stand. The language involved here is hardly inflammatory, and much of Dominguez's case involved trying to prove that Hendley engaged in a deliberate frame-up of Dominguez; a fleeting reference to his being a "bad officer" seems rather trivial in light of the whole record and unlikely to influence the jury if it was not otherwise inclined to credit the evidence against Hendley.

Next Hendley complains that Dominguez's counsel misled the jury by referring to "they," so as to obscure who was responsible for what actions. For example, counsel said things like "they interrogated [Dominguez]," and "they kept him there all night and deprived him of a lawyer." Hendley points out that, for example, it was Officer Marquez rather than Hendley who interviewed Dominguez. Nonetheless, we conclude that the district court did not abuse its discretion in allowing these remarks, because Dominguez was not misleading the jury if he could show that these acts were taken under Hendley's direction. The defense was free to point out who engaged in the physical acts and to refute the contention that Hendley was leading the investigation. Most importantly, the jury was instructed to find for the plaintiff only if *Hendley* caused the denial of a fair trial. The district court was entitled to take the position that this was sufficient to eliminate the risk that the jury would find Hendley liable for acts for which he had no responsibility.

In addition, Hendley believes that Dominguez's counsel confused the jury about when exactly Hendley became aware of various facts relating to Dominguez's criminal case. This argument relies on Hendley's insistence that information available only after the time of arrest is irrelevant. Once again, this flows from Hendley's refusal to acknowledge that the trial was about the deprivation of a fair criminal trial for Dominguez, not about the alleged false arrest.

Hendley also argues that questioning Mr. Carter, Dominguez's criminal defense attorney, using hypotheticals because Carter could not remember Dominguez specifically, was improper, but he cites no authority in support of this position. He also argues that Carter's claim – that Carter would have used the alleged *Brady* material to support Dominguez's criminal defense – is undermined by the fact that Carter did not use any of the documents that actually were provided. We see no error here: it was up to the jury to decide what weight, if any, to give to Carter's testimony.

Hendley's next set of arguments relates to the district court's decision to enforce the final pretrial order strictly against the defense (as he sees it), but not against the plaintiff. He points out that when the defense took issue with the fact that Dominguez did not include the *Brady* issue as a contested issue of law in the final pretrial order, the court said, "we don't need that as part of the final pretrial order"; by contrast, certain defense objections during trial were overruled because the defense had not objected to the admission of the exhibits listed on the final pretrial order. The *Brady* issue was a factual one rather than a legal one, and so we see no error there. The fact that the pretrial order form did not have the customary spaces in which to indicate an objection does not relieve a party from the duty to notify the court in a timely manner that it objects.

Hendley also asserts that the district court should not have admitted a document referred to as

the "Chancey Memo," because the memo was speculative, irrelevant, and highly prejudicial. This was a memorandum written by Matt Chancey, chief of the felony division of the Lake County State's Attorney's Office. The memo informed prosecutors that their obligation to scrutinize cases carefully was "especially true in the case of Officer Hendley because of the questions which exist about his credibility." The Chancey Memo directed those reviewing felony cases to (1) refuse to approve cases involving confessions supposedly obtained by Hendley without recorded or written confessions unless the case is prosecutable without the confession; (2) refuse to approve charges in cases where Hendley interviewed key witnesses, until the accuracy of the purported statements was verified; (3) require corroboration in any case where Hendley handled physical evidence or would be called to testify about his observations.

Naturally, this was quite prejudicial, but the question is whether it was unfairly prejudicial. The claim against the City was still alive during the trial, and this memo was relevant and highly probative for the question whether the City of Waukegan was aware that there were problems with Officer Hendley. The district court did not abuse its discretion in admitting the Chancey Memo.

Hendley claims that it was error for the district court to limit the defense's examination of the prosecutor from Dominguez's criminal case. This inquiry was important to him, he says, because the procedures followed by the prosecutor would have helped

support Hendley's defense that other actors were superseding causes of the wrongful conviction, or equivalently, that Hendley did not proximately cause it. A look at the record shows, however, that the district court was simply managing the trial appropriately. The defense's examination of this witness took up 114 trial-transcript pages, and Hendley has not shown that the district court abused its discretion in urging defense counsel to stay on track and refrain from confusing the jury.

Hendley also complains about a grab-bag of "prejudicial testimony." He objects to the amount of evidence that Dominguez's attorney elicited about Dominguez's innocence and the inadequacy of the facilities where he was detained. But this information was relevant to liability and damages, and the district court had no reason to exclude it. Hendley also objects to Dominguez's attempt to blame Hendley for the actions and omissions of others, but we have already explained why this does not accurately reflect Dominguez's purpose. Hendley also tries to find fault with the fact that Dominguez urged the jury to credit certain parts of Lisa Kraus's testimony, while painting her as a liar with regard to other matters. There is nothing improper about this. He also claims that Dominguez misled the jury by pushing the theory that Hendley should have continued investigating up to the time of Dominguez's criminal trial. But this is just another variation on Hendley's theme that any events subsequent to Dominguez's arrest are irrelevant, so long as there was probable cause at the time

of arrest. This argument lacks merit, for the reasons we have already given.

Finally, Hendley claims that the plaintiff gave an improper pretrial interview. As Dominguez notes, and Hendley does not dispute, the defense did not seek a mistrial in the court below based on this interview – it merely sought to broaden voir dire. At voir dire, it was established that no member of the venire knew about the interview, and no seated juror even watched the news channel on which the interview aired. Thus, the defense was not prejudiced by this interview, and no error occurred as a result of allowing the trial to proceed.

Finding no errors among the issues raised by Hendley, we have no occasion to assess any cumulative effect.

* * *

We AFFIRM the judgment of the district court.

United States District Court
Northern District of Illinois
Eastern Division

Alejandro Dominguez

v.

Paul Hendley

JUDGMENT IN A CIVIL CASE

Case Number: 04 C 2907

(Filed Oct. 17, 2006)

■ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

☐ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that final judgment is entered in favor of the Plaintiff and against the defendant, Paul Hendley in the total sum of $9,063,000.00.

Michael W. Dobbins,
Clerk of Court

Date: 10/17/2006

/s/ S Newland
Sandy Newland,
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois –
CM/ECF LIVE, Ver 2.5
Eastern Division

S Alejandro Dominguez

Plaintiff,

v.

Paul Hendley, et al.

Defendant.

Case No.: 1:04-cv-02907
Hon. Milton I. Shadur

NOTIFICATION OF DOCKET ENTRY

(Filed Dec. 4, 2006)

This docket entry was made by the Clerk on Monday, December 4, 2006:

MINUTE entry before Judge Milton I. Shadur: Motion for leave to file crossclaim [154] is entered and continued. MOTION by Defendant Paul Hendley Combined Posttrial Motion and Memorandum of Law Renewing His Motion for Judgmetn [sic] as a Matter of Law and Alternatively, Moving for a New Trial[135]is denied. MOTION by Defendant Paul HendleyCombined Posttrial Motion and Memorandum of Law Renewing his Motion for Judgment as a Matter of Law and Alternatively, Moving for a New Trial[134]is denied. MOTION by Defendant Paul Hendley To Stay Proceedings for Execution and/or Enforcement of Judgment[132]is denied., Motion hearing held on 12/1/2006. In court notice. ttachments [sic] >(srn,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

S. ALEJANDRO DOMINGUEZ, Plaintiff,	)	
v.	)	No. 04 C 2907
PAUL HENDLEY, et al., Defendants.	)	

JUDGMENT ORDER

(Filed Dec. 13, 2006)

On October 13, 2006, after the close of proofs in the jury trial in this 42 U.S.C. §1983 ("Section 1983") action but before the jury reached its verdict (that took place on October 17), this Court issued its oral ruling dismissing the City of Waukegan ("City") as a codefendant. That ruling was based on the failure of proof as to City in terms of the substantive Section 1983 claims of plaintiff S. Alejandro Dominguez ("Dominguez"), but with the express understanding – based on the representations of counsel for all the parties – that City had unconditionally undertaken to indemnify codefendant Paul Hendley ("Hendley") for any awards of compensatory damages and attorneys' fees entered against him. Indeed, here are the written confirmations of those undertakings that had been sworn to on City's behalf and signed as well by its counsel in September 2004 (part of City's Response to

Plaintiff's First Set of Requests To Admit) and that were never withdrawn or modified thereafter:

> 7. The City of Waukegan is obliged to indemnify the Responding Officers [Hendley and John Moran] for any award of compensatory damages against them at trial.
>
> ANSWER: Defendant admits the allegations of paragraph 7.
>
> 8. The City of Waukegan is obliged to indemnify the Responding Officers for any award of attorneys' fees against them at trial.
>
> ANSWER: Defendant admits the allegations of paragraph 8.

Those undertakings obviated any need for this Court (or the jury) to address Dominguez' state law claim for such indemnification as embodied in Count VII of his First Amended Complaint ("FAC"). Indeed, City had also confirmed its obligation in that respect in its Answer to the FAC – here are Paragraphs 68 and 69 of the FAC and Answer, in which City again admitted its obligation (though it denied misconduct on Hendley's part):

> 68. Illinois law provides that public entities are directed to pay any tort judgment for compensatory damages for which employees are liable within the scope of their employment activities.
>
> ANSWER: Defendants admit the allegations of paragraph 68.

> 69. Defendant Officers are or were employees of the Waukegan Police Department, who acted within the scope of their employment in committing the misconduct described herein.
>
> ANSWER: Defendants admit that the officers investigating the sexual assault of Lisa Kraus were acting within the scope of their employment and deny the remaining allegations of paragraph 69.

Now City has articulated the possibility that it is improperly repudiating its express undertaking of indemnification, which would (if successful) leave Dominguez with an uncollectible judgment against Hendley in excess of $9 million (the amount awarded in the jury verdict). That has led to a proper oral Fed. R. Civ. P. 60(b) motion by Dominguez' counsel to vacate the dismissal of City with respect to FAC Count VII (and through it with respect to Count II, the substantive Section 1983 due process of law claim). That motion is well taken, and Dominguez is entitled to the relief he seeks in that respect as a matter of law.

Accordingly, as previously stated on the record and for the reasons stated there and in this judgment order, most specifically the binding admissions and undertakings by City that it is obligated to indemnify codefendant Hendley for all compensatory damages and attorneys' fees for which he has been or will be held liable within the scope of his employment activities, the prior dismissal of City as a defendant in this

action is vacated and Dominguez' motion for judgment in his favor and against City under FAC Count VII (and through it under FAC Count II) is granted. City is ordered to be held liable as indemnitor for all sums that Hendley is obligated to pay in this litigation, including but not limited to the amount set forth in this Court's Judgment of October 17, 2006 (Doc. 131), which is attached hereto and incorporated herein. City is further ordered to be jointly and severally liable with Hendley as to all such sums, and a judgment shall be entered against it in accordance with this judgment order.

/s/ Milton I. Shadur
Milton I. Shadur
Senior United States
District Judge

Date: December 13, 2006

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

May 30, 2008

Before

WILLIAM J. BAUER, *Circuit Judge*

KENNETH F. RIPPLE, *Circuit Judge*

DIANE P. WOOD, *Circuit Judge*

S. ALEJANDRO DOMINGUEZ, Plaintiff-Appellee, Nos. 07-1004, 07-1005 and 07-3030 v. PAUL HENDLEY and CITY OF WAUKEGAN, Defendants-Appellants.	] Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.]] No. 04 C 2907]] Milton I. Shadur, Judge.

IT IS ORDERED that counsel for the appellee may file a memorandum, by June 9, 2008, addressing the cases cited for the first time at oral argument. Counsel for the appellant may file a responsive memorandum by June 19, 2008.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

October 31, 2008

Before

WILLIAM J. BAUER, *Circuit Judge*

KENNETH F. RIPPLE, *Circuit Judge*

DIANE P. WOOD, *Circuit Judge*

Nos. 07-1004, 07-1005 & 07-3030

ALEJANDRO DOMINGUEZ, *Plaintiff-Appellee*, *v.* PAUL HENDLEY and CITY OF WAUKEGAN, *Defendants-Appellants.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 04 C 3570 **Milton I. Shadur,** *Judge.*

ORDER

On consideration of the Petition for Panel Rehearing filed by the defendants-appellants on October 14, 2008, all members of the original panel have voted to DENY the petition.

Accordingly, the petition for rehearing is hereby DENIED.